

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

The Berkshire Gas Company

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D.T.E. 06-27

**THE ATTORNEY GENERAL’S OPPOSITION TO THE BERKSHIRE GAS
COMPANY’S MOTION TO NARROW THE SCOPE OF THIS PROCEEDING AND
REQUEST FOR SUMMARY JUDGMENT**

I. INTRODUCTION

On June 9, 2006, The Berkshire Gas Company (“Berkshire” or “Company”) moved to narrow the scope of this proceeding and for summary judgment. The Department of Telecommunications and Energy (“Department”) should deny Berkshire’s motion. A review of the Company’s imprudent failure to mitigate supply acquisition costs falls squarely within the scope of this proceeding, and genuine issues of material fact exist on the issue of the Company’s prudence, precluding summary judgment on this issue. The Department should conduct a brief second phase of this proceeding to address the issue fully.

II. PROCEDURAL HISTORY

On March 9, 2006 the Department opened this proceeding with a Notice of Filing and Public Hearing that stated that it would “examine issues including, **but not limited to**, whether the Agreement [proposed by the Company] is in the public interest and . . . consistent with the Company’s most recently filed forecast and supply plan.” *Berkshire Gas Company*, D.T.E. 06-27, Notice of Filing and Public Hearing at 1, (Mar. 9, 2006) (emphasis supplied). Pursuant to the

procedural schedule set by the Hearing Officer, the Attorney General intervened on March 22, 2006. During the month-and-a-half long discovery period, the Attorney General issued two sets of information requests and the Department issued one set; the Company did not object to any of the questions posed.

On May 23, 2006, the Department held an evidentiary hearing. During the evidentiary hearing the Attorney General cross examined the Company's witness on facts related to whether the gas purchase agreement between Berkshire and Coral Energy Resources, L.P. ("Proposed Agreement") is in the public interest.¹ Before the Attorney General had the opportunity to cross examine the Company's witness on the Company's handling of the loss of a gas supply agreement ("Predecessor Agreement"), the agreement that the Proposed Agreement would partially replace, the Company moved to narrow the scope of this proceeding and for summary judgment.² Evidentiary Hearing Transcript ("Tr.") at 37-38. The Attorney General objected and requested the opportunity to submit a written opposition. *Id.* at 46-47. The Hearing Officer granted the Attorney General's request to submit a written opposition, temporarily suspended cross examination on the Predecessor Agreement, and instructed the parties to submit briefs to address whether the Proposed Agreement meets the Department's public interest standard. Pursuant to the procedural schedule set by the Hearing Officer, the Company and the Attorney

¹ The Attorney General intended to cross-examine the Company's President and Treasurer Karen Zink on the prudence issue. Jennifer Boucher appeared as the Company's witness, and the Company made Karen Zink available at the Attorney General's request.

² The Predecessor Agreement includes two Agreements: the Fuel Purchase Agreement ("FPA") and the Amended Fuel Purchase Agreement ("AFPA") between Pittsfield Generating Company L.P. and Berkshire. *See* Exh. DTE-1-6, Attachment (d) (Avery Memo to file 8/12/04). *Id.*

General concurrently submitted Initial Briefs on June 2, 2006 and Reply Briefs on June 9, 2006, and the Company submitted a written motion on June 9, 2006.

III. STATEMENT OF FACTS

Pittsfield Generating Company, L.P. (“Pittsfield”) sold a portion of the natural gas it purchased as fuel for its combined cycle power plant to Berkshire under the Predecessor Agreement. Exh. DTE-1-6, Attachment (b); See Evidentiary Hearing Transcript, Cambridge Electric Light Company, D.T.E. 04-60 at 30-31 (Aug. 8, 2004). Berkshire used the gas as a winter peaking supply. *Id.* In 2004, after Pittsfield began to significantly reduce operations, it contracted to terminate one of its Power Purchase Agreements (“PPA”), which led its Canadian gas supplier to sue Pittsfield in July of 2004. *See* Attachment: Amended Statement of Claim, *Devon Canada Corporation v. PE-Pittsfield, et. al.*, Action No. 0401-10854, at 4, para 17, 26 (Jan. 10, 2005) (Court of Queen’s Bench of Alberta Judicial District of Calgary) (offered as Exhibit 2 by the Attorney General in this proceeding). Its Canadian gas supplier alleged that it had breached their gas supply agreement (“Pittsfield-GPA”) by terminating the PPA, and that its breach terminated the gas supplier’s obligation to deliver gas to Pittsfield.³ *Id.*

During the summer of 2004, Berkshire became aware of these changes at Pittsfield that led it to believe that Pittsfield may not provide a winter peaking supply under the Predecessor Agreement. Exhibit (“Exh.”) AG-1-13; Exh.; DTE-1-6, Attachment (b). Berkshire’s outside counsel reviewed its rights under REDACTED and other related agreements. Exh. DTE-1-6, Confidential Attachment (d) (J.Avery’s notes to file); Exh. AG-1-18. Berkshire’s REDACTED

³ Pittsfield purchased gas under the Pittsfield-GPA to sell to Berkshire under the Predecessor Agreement. Exh. DTE-1-6, Attachment (c).

Exh. DTE-1-6, Confidential Attachment (d) (J.Avery's notes to file). REDACTED The Company also did not provide any evidence it considered REDACTED to protect its interest REDACTED. Exh. AG-1-18; Exh. AG-1-18, Supplemental. The Company "determined that pursuing litigation was not in the Company's interest." Exh. AG-1-18.

On October 7, 2004, PurEnergy L.L.C. ("PurEnergy"), the Company currently operating Pittsfield, informed Berkshire that it would no longer provide Berkshire with a winter peaking supply under the Predecessor Agreement. Exh. DTE-1-6, Attachment (b). PurEnergy, however, also told Berkshire that General Electric Company ("GE"), Pittsfield's parent company, hoped to enter into another agreement with it for the use of Berkshire's feedline.⁴ *Id.* Berkshire procured a number of contracts to replace the Predecessor Agreement and some were more expensive; the Proposed Agreement is one of the replacement contracts.⁵ Exh. BG-1 at 6, lines 19-22; at 9, lines 1-12 (explaining that customers incurred incremental costs from a demand charge).

III. ARGUMENT

A. Review of the Company's Imprudent Failure to Mitigate Supply Acquisition Costs Falls Squarely Within the Scope of This Proceeding.

The Department broadly defined the scope of this proceeding in its Notice of Filing and Public Hearing ("Notice"). That broad scope clearly includes a review of Berkshire's imprudent handling of the loss of its Predecessor Agreement. *Berkshire Gas Company*, D.T.E. 06-27,

⁴ If Berkshire entered into such an agreement, it could collect payment for use of the feedline. Exh. DTE-1-6, Attachment (b). Pittsfield had previously received \$500,000 per year from Pittsfield for use of the feedline, and those dollars went to shareholders, not customers. *Id.*, at 2. Berkshire made it a top priority to somehow secure funds for use of its feedline and wanted to maintain business relationships to do so. *See Id.*

⁵ The Department should determine the extent of this additional cost in either this proceeding or the next CGAC proceeding.

Notice of Filing and Public Hearing at 1, (Mar. 9, 2006); Tr. at 46, lines 15-24. The Department's Notice stated that, in this proceeding, it would:

[e]xamine issues including, **but not limited to**, whether the [Proposed] Agreement is in the public interest and whether the [Proposed] Agreement consistent with the Company's most recently filed forecast and supply plan.

Id. (emphasis added). The Company, therefore, mistakenly asserts that this proceeding examines only whether the Proposed Agreement is in the public interest. *Notice* at 1.

The prudence inquiry here directly relates to a review of the Proposed Agreement. The Company's imprudent handling of the loss of its Predecessor Agreement contributed to the need to replace the Predecessor Agreement with new resources, including the Proposed Agreement. Although the inquiry may involve other contracts, that does not place it outside the scope of this proceeding. First, if the Company had closely monitored the status of the operations of Pittsfield, and the status of the Predecessor Agreement and its underlying agreements with Pittsfield, the Company may have avoided the need for the total replacement of the Predecessor Agreement.⁶ Second, if the Company had [REDACTED]. Third, Berkshire's desire to preserve its business relationship with Pittsfield and to generate profits for shareholders from use of its feedline conflicted with using maximum efforts to make sure customers were not harmed by the termination of the Predecessor Agreement. As a result, Berkshire entered into this Proposed Agreement and the other replacement agreements that, overall, resulted in higher costs for customers.

Nothing in G.L. c. 164, §94A, prohibits the Department from reviewing Berkshire's

⁶ With more advance notice the Company could have mitigated supply replacement costs by procuring gas by a method other than the spot market.

imprudence in this proceeding or from considering issues related to a contract before the Department for review under G.L. c. 164, §94A. Under the Department's own precedent, it can consider related issues, such as prudence, in a proceeding involving G.L. c. 164, §94A, when an appearance of imprudence surfaces. *C.f. Commonwealth Gas Company*, D.P.U. 94-474-A(1996). In *Commonwealth*, the Department stated that it would exclude review of a Company's prudence on capacity contracts in a G.L. c. 164, §94A, proceeding because the review of prudence for the acquisition of too much capacity would jeopardize the contracting process. *Commonwealth*, at 30. That is not the case here. By reviewing the prudence of the Company's actions in a Phase II proceeding, the Department could address the prudence issue while maintaining unencumbered review of the Proposed Agreement under G.L. c. 164, §94A.⁷

Although the Company relies on *Cambridge Electric Light Company/Commonwealth Electric Company*, a close reading of that case shows, contrary to the Company's assertion, the Department has a different issue before it now than it did in that case. In this proceeding, the Attorney General seeks to determine whether Berkshire's actions, based on all that it knew or should have known at the time it decided not to pursue litigation, were reasonable and prudent in light of circumstances that then existed.⁸ *See e.g. Boston Edison Co.*, 393 at 245; *Boston Gas Company*, D.P.U. 93-60, at 24-25 (1993); *see also Town of Hingham v. Dept. of Telecommunications and Energy*, 433 Mass. 198, 202 (2001) (recovery of costs from customers in context of base rates allowable only when costs are prudently incurred). This prudence inquiry does not include a request to determine whether Pittsfield breached the Predecessor Agreement nor cross examination of a lay witness on interpretation of the Predecessor Agreement. It only seeks to determine whether the Company's underlying actions resulted in agreements to replace the Predecessor Agreement that are more expensive for customers than it might have been if the

⁷ The Attorney General and Berkshire already participated in an evidentiary hearing on whether the contract meets the public interest standard and submitted briefs on the issue.

⁸ Further discovery may lead to other acts of imprudence.

Company had acted prudently, or if the Company's failure to monitor the situation at Pittsfield, and to assess its options under the Proposed Agreement led customers to pay too much for gas.

Prompt review of the Company's actions and decisions will ensure that customers are reimbursed if the Company acted imprudently. Waiting until a rate case or cost of gas adjustment factor ("CGAC") proceeding will pose the risk that evidence may be lost, witnesses may become unavailable or get new jobs, and memories fade, making the case much more difficult to review, and, therefore, administratively inefficient.⁹ No good cause exists to suspend the investigation into Berkshire's imprudence until a rate case or a CGAC proceeding.¹⁰ Holding Phase II of this proceeding on Berkshire's prudence is essential to ensure that the Attorney General is not prejudiced. The Department should not accept the Company's argument to narrow the scope of the proceeding now when it has had notice and the opportunity to dispute the direction of this proceeding since the Department issued its Notice.¹¹

B. A Genuine Issue of Material Fact Exists as to The Company's Prudence in Handling the Loss of the Predecessor Agreement.

The Department should deny the Company's request for summary judgment because a genuine issue of fact exists with respect to the Company's prudence in handling the termination of the Predecessor Agreement. The Company attempts to rely on Federal Energy Regulatory Commission ("FERC") proceedings to resolve this issue, but there is no evidence that the

⁹ The Company did not even have the underlying contracts so that the Attorney General had to subpoena them from Pittsfield.

¹⁰ Berkshire's next rate case is a few years away and CGAC proceedings are usually abbreviated.

¹¹ The Company suggested that the Attorney General should demonstrate that the relevant statute of limitations have run on litigation regarding the Predecessor Agreement before the Department conducts a prudence review, however, the Department should not suspend its review of the Company's prudence until the statute of limitations runs because the Company already decided it would not pursue litigation on the Predecessor Agreement. *See Berkshire Gas Company Motion* ("Motion"), at 10.

Company or the Attorney General participated in those proceedings, or that the decisions in those proceedings provide any determination that gives rise to res judicata. *See e.g. Heacock v. Heacock*, 402 Mass. 21, 23 n. 2 (1988) (describing res judicata to include (a) claim preclusion that bars further litigation on all matters that were or should have been litigated in a proceeding and issue preclusion that prevents relitigation of an issue determined in an earlier action between same parties or their privities). There is no evidence that those FERC proceedings dealt with or should have dealt with the rights of the Company under the Predecessor Agreement. Therefore, the fact that those FERC proceedings occurred, and that they resulted in the release of capacity, fails to show a lack of a genuine issue of material fact in this case or the Company's prudence.¹² For these reasons, the Department should deny the Company's motion.

Respectfully submitted,

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cc: John J. Keene, Jr., Esq., Hearing Officer

¹² *See supra* at 6-7 for discussion of the questions surrounding the Company's prudence. Those arguments raise questions of genuine issues of material fact, precluding summary judgment.

Service List